

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NORMA KAY,
Appellant.

No. 2 CA-CR 2019-0171
Filed June 26, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201802177
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Norma Kay appeals her convictions on two counts of sexual conduct with a minor under fifteen, contending that the state’s thirteen-year delay in indicting her was intentionally calculated for tactical advantage and therefore violated her right to due process. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Kay’s convictions. *State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). In 2003, Kay sexually abused her stepdaughter J.H. while performing a massage on her.¹ J.H. did not report the abuse until 2005, and police investigated, but Kay was not charged.

¶3 After being prompted by a therapist, J.H. contacted police in December 2017 to inquire about the status of the 2005 investigation. Police investigated further, and in 2018 – thirteen years after J.H. first reported the incidents – a grand jury indicted Kay on two counts of sexual conduct with a minor under fifteen.² After a two-day bench trial, Kay was convicted of both counts. The trial court sentenced her to two consecutive thirteen-year terms and she timely appealed. We have jurisdiction under A.R.S. §§ 13-4031 and 13-4033(A)(1).

¹During the time J.H. lived with Kay, J.H. knew her as both Nana Kay, a female parent, and Nicholas Horn, a stepfather. Although the opening brief refers to Kay by the pronouns “they” and “them,” we refer to her by feminine pronouns, consistent with her apparent preference as reflected in the trial record.

²Kay was also indicted on one count of sexual abuse, but that count was dismissed before trial as barred by the statute of limitations.

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Discussion

¶4 Kay contends the state violated her right to due process by intentionally delaying her indictment for thirteen years to allow J.H. to become a credible witness. Kay maintains she was improperly deprived of the opportunity to impeach J.H. when she was an “angry teenager” with credibility issues and instead had to confront her as “a credible witness with a job and going to school.” Kay claims to also have been prejudiced by a societal shift in attitudes creating a presumption of guilt when a person accuses another of a sex crime. Finally, she claims additional prejudice from the fact that she is now in her late seventies and it is highly improbable that she will survive her full sentence.

¶5 We review de novo a claim that a criminal defendant’s due process rights have been violated. *See State v. O’Dell*, 202 Ariz. 453, ¶ 8 (App. 2002). Because Kay did not object in the trial court, we apply fundamental error review, in which Kay bears the burden of persuasion. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005); *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018).

¶6 “The due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution . . . protects defendants from unreasonable delay.” *State v. Lacy*, 187 Ariz. 340, 346 (1996). “The due process clause plays only a limited role in evaluating pre-indictment delay,” however; the defendant’s primary protection against stale prosecutions is the statute of limitations. *State v. Broughton*, 156 Ariz. 394, 397 (1988). Mere “investigative delay” does not deny a defendant due process, even if the defendant is somewhat prejudiced. *Id.* at 397-98. Rather, a person claiming a due process violation from prosecutorial delay “must show that the prosecution intentionally slowed proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted.” *Lacy*, 187 Ariz. at 346 (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). A due process claim for prosecutorial delay will fail “[a]bsent proof of an intentional delay for strategic or harassment purposes,” *id.*, that “violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” *Broughton*, 156 Ariz. at 397 (internal quotations omitted) (quoting *Lovasco*, 431 U.S. at 790).

¶7 Kay infers intent to delay for tactical advantage from the fact the state left the case open despite a lack of investigation after 2005. She maintains that “it appears that the [delay] was intentional to see if [J.H.] would shape up and be a credible witness.” She does not explain why such

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an inference is warranted, however. Indeed, the record suggests that the state did not prosecute Kay in 2005 because prosecutors could not find J.H., and Kay's prosecution in 2018 was precipitated by J.H.'s inquiry into the status of the case. To the extent there is any uncertainty regarding the state's reasons for delay, it can be attributed to Kay's failure to object in the trial court and develop the record on that issue. *See United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) (upon motion to dismiss for intentional delay, if defendant proves actual and substantial prejudice, "the government must come forward and provide its reasons for the delay").

¶8 Even were we to assume that the victim's lack of credibility in 2005 played a part in the state's decision not to prosecute at that time, that fact alone would not create a due process violation. A prosecutor is "under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 791. In 2005, prosecutors were entitled to consider the victim's credibility in deciding whether they would be able to prove Kay's guilt beyond a reasonable doubt. In 2018, they were entitled to consider the same so long as the delay had not occurred for the purpose of awaiting improvement in the victim's credibility. A delayed prosecution resulting from proper considerations is not one that violates fundamental conceptions of justice or would offend the community's sense of fair play. *See Sowa*, 34 F.3d at 451 ("[N]othing short of bad faith by the government in turning the prejudice to its tactical advantage will rise to the level of a due process violation."). In sum, Kay has failed to carry her burden of establishing that the state intentionally delayed for tactical advantage or to harass her. *See Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir. 1985) (affirming trial court's denial of due process claim for prosecutorial delay where, "although the state ha[d] not proffered a good, detailed reason for the delay . . . , no bad faith reason existed either").

Disposition

¶9 We affirm Kay's convictions and sentences.